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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

AMERICA WEST AIRLINES, INC.,
Petitioner,
VS.
NATIONAL MEDIATION BOARD;
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS, AFL-CIO,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that a federal court has jurisdiction to review a decision of the National Mediation Board only when a "peek at the merits" of the complaint shows that the National Mediation Board has grossly violated the Railway Labor Act, exceeded its statutory authority or committed a constitutional violation.

2. Whether the National Mediation Board grossly violated the Railway Labor Act or exceeded its statutory authority by certifying the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO, as the collective bargaining representative for the mechanics and related employees at America West Airlines, Inc. under circumstances where the National Mediation Board allowed discharged workers to vote in the union representation election even though they were not employees in the service of the carrier, were not themselves pursuing claims for reinstatement and had signed release agreements expressly waiving any right to do so.

PARTIES

The parties are America West Airlines, Inc. ("America West"); the National Mediation Board (the "NMB" or the "Board"); and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL-CIO (the "IBT" or the "Union").

Pursuant to Rule 29.6 of the Rules of the Supreme Court, petitioner states that America West is a wholly owned subsidiary of America West Holdings Corporation. America West has no subsidiaries and America West Holdings Corporation has no subsidiaries which are not wholly owned.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully submits that a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 119 F.3d 772, and is reprinted in the Appendix hereto at 1a. The court's denial of rehearing and suggestion for rehearing en banc, reprinted in the Appendix hereto at 16a, is unreported. The district court's opinion is unreported and is reprinted in the Appendix hereto at 17a. The opinion of the NMB is reported at 23 N.M.B. 174 (1996), and is reprinted in the Appendix hereto at 30a.

JURISDICTION

The opinion of the court of appeals was filed on July 11, 1997. A timely petition for rehearing and suggestion for rehearing en banc was denied on September 29, 1997. This petition is being timely filed within 90 days of that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

This petition involves an interpretation of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 et seq. More specifically, this petition involves the following provisions of the RLA:

Section 152, Fourth:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 52, Ninth:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain

and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF THE CASE

Factual Background: On or about December 2, 1995, in an effort to reduce its operating costs, America West announced its intention to subcontract its heavy maintenance function to an outside vendor. As a result of the decision to subcontract, America West discharged about 500 employees, including 378 members of the mechanics and related employees craft or class. Of the 378 discharged mechanics, 375 signed release agreements waiving any rights to reinstatement with America West, in exchange for substantial consideration of up to $10,000 per individual.

On December 27, 1995, the IBT and five of the discharged employees, including four who had signed releases, filed a purported class action lawsuit in the United States District Court for the District of Arizona against America West seeking reinstatement. America West filed a motion to dismiss the claims of the discharged workers who had signed release agreements as well as those of the IBT. That motion was eventually granted by the district court on September 4, 1996.

While the above-referenced lawsuit and the motion to dismiss were pending, on January 29, 1996, the IBT filed an application with the NMB to represent the mechanics and related employees at America West. During the course of the NMB's investigation into the representation dispute, America West argued that the ballots cast by discharged workers should not be counted

in the representation election while the IBT contended that they should.

On March 15, 1996, America West was advised that the Board would mail provisional or "challenged ballots" to the discharged workers, and that the Board would decide at a later date whether those ballots would in fact be counted. Presumably this was done so that the Board's mail ballot election process would not be delayed while a decision was made regarding voter eligibility. Thus, on March 20, 1996, the Board mailed regular ballots to all current employees deemed eligible to vote, and specially marked ballots to the discharged former workers so that ballots could be identified as challenged at the vote count. Those receiving ballots were instructed where to return the ballot and by what date.

On March 20, 1996, just as the ballots were being mailed by the NMB, the Board's mediator assigned to the case issued a written decision holding that the provisional ballots sent to the discharged workers who had signed release agreements would indeed be counted. The mediator based his decision on the NMB's "dismissed employee" rule, which permits former employees to vote in elections when they have pending claims for reinstatement. While the mediator acknowledged that the case presented an issue of "first impression" because the discharged America West employees had not themselves filed claims seeking reinstatement, he found that it was sufficient that the IBT itself had filed a putative class action lawsuit on behalf of the discharged mechanics (a lawsuit that had not yet been dismissed), in which the Union alleged that the releases signed by the discharged workers were unenforceable. In campaign materials distributed to potential voters, the IBT characterized the mediator's decision to enfranchise

discharged workers as a "stunning victory" which was "unprecedented." The Union also asserted that if it were elected, it would "secure [the terminated employees] the right to be recalled with the return of heavy maintenance work," a promise that was without any factual basis.

On April 17, 1996, the day the ballots were tallied, the full Board affirmed the earlier decision of its mediator that the challenged ballots cast by discharged workers would be counted.[1] Like the mediator, the full Board based its determination on its "dismissed employee" rule, relying on the fact that the IBT had filed a putative class action lawsuit, purportedly on behalf of the 373 unnamed discharged mechanics, requesting their reinstatement. Neither the mediator nor the full Board did anything to investigate whether the discharged workers who signed releases endorsed the lawsuit filed by the Union and the Union presented no evidence whatsoever to demonstrate such support. The IBT eventually won the election -- receiving majority support from both the current and discharged employees -- and was certified by the NMB to represent the America West mechanics on April 19, 1996.

The Complaint: Based on these facts, America West filed the Complaint in this action, seeking declaratory and injunctive relief, and also moved for a preliminary injunction. America West sought to enjoin the NMB from enforcing the certification of the IBT as collective bargaining representative of the mechanics and related employees, and sought an order enjoining the IBT from attempting to enforce the challenged

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[1] As a result of this decision, over 50 percent of the eligible voters were not America West employees.

certification. America West also sought a judicial declaration under the RLA, 45 U.S.C. § 152, First, that the IBT, by filing a class action lawsuit purportedly on behalf of the 373 terminated workers, had interfered with the election process and unlawfully manipulated the election procedures established by the NMB.

Throughout the proceeding in the district court, and in its filings before the Ninth Circuit, America West argued that the NMB and the IBT had violated the RLA during the election process, and that their conduct had tainted the election and rendered the results of the election completely unreliable with regard to all voters, including current employees and discharged workers. The content and timing of the decision to count the ballots of the discharged workers, rendered by the Board's mediator on March 20, 1996, interfered with the election because it served to validate the Union's primary campaign issue -- that America West acted unlawfully when it discharged workers in December 1995. Moreover, America West argued that the Union's filing of a lawsuit purportedly on behalf of the discharged workers, with the provision of free legal services, improperly influenced those voters, because the discharged workers undoubtedly felt obliged to vote for the Union out of gratitude and in order to continue receiving the benefit, i.e., the free legal services.

Basis for federal court jurisdiction: America West invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331.

The District Court's decision: On September 3, 1996, the district court entered a written order dismissing the NMB for lack of subject matter jurisdiction. The district court also granted

the IBT's motion for preliminary injunction compelling America West to negotiate with the Union and denied America West's motion for preliminary injunction.

The Court of Appeals' Decision: America West appealed the district court's decision dismissing the NMB from the lawsuit and granting preliminary relief to the IBT. A panel of the Ninth Circuit affirmed the district court. America West Airlines, Inc. v. National Mediation Bd. ("America West II"), 119 F.3d 772 (9th Cir. 1997)(Appendix at 1a). Adopting a "peek at the merits" jurisdictional standard which was inconsistent with two prior Ninth Circuit decisions, with the most recent en banc decision from the District of Columbia Circuit and with applicable decisions of this Court, the panel ruled that it was without jurisdiction to review the NMB's determination. In doing so, based only on a "peek at the merits" of the complaint, and without allowing any discovery or evidentiary hearings, the court ruled that it was without jurisdiction to decide whether the NMB committed a gross violation of the RLA when it decided to send provisional ballots to the discharged former employees. App. at 10a-12a. It also ruled that any challenge to the full Board's decision on the day of the vote count to include the provisional ballots cast by the discharged former workers was moot because the Union would have won the election even if the discharged employees' provisional ballots had not been counted. App. at 13a. The panel's decision, however, did not rule moot or even address America West's challenge to the Board mediator's earlier March 20 decision that the ballots of the discharged workers would be counted -- a decision announced at the start of the balloting period which, according to America West's Complaint, clearly did have an impact on how both current and discharged employees voted in the election.

On August 25, 1997, America West filed a petition for rehearing and suggestion for rehearing en banc. In that petition, America West argued that the panel adopted the wrong standard, i.e. "a peek at the merits," for determining its jurisdiction to review decisions of the NMB which exceed the NMB's statutory authority or constitute a gross violation of the RLA. America West also contended that the panel misapprehended the grounds for America West's appeal. While the panel believed that America West was challenging the Board's decision to send provisional ballots to the discharged workers, America West's complaint actually challenged the decision of the Board's mediator at the start of the mail balloting process (and the subsequent decision of the full Board itself) to count the provisional ballots. The Ninth Circuit rejected the petition in an order filed September 29, 1997.

REASONS FOR GRANTING THE WRIT

A writ of certiorari may be granted where a circuit court of appeals has rendered a decision on an important issue of federal law which conflicts with the decision of another circuit court of appeals or has decided an important issue of federal law which has been indirectly, but not conclusively decided by this Court. **Rule 10 of the Rules of the Supreme Court of the United States**. The Ninth Circuit's holding that a court may only "peek at the merits" of a complaint to assess whether the NMB has exceeded its statutory authority, committed a gross violation of the RLA or violated the constitution is inconsistent with the decisions of this Court, with the standard employed by the District of Columbia Circuit in a recent en banc decision and by previous panels of the Ninth Circuit itself, which held that the federal courts have jurisdiction, unlimited by a "peek at the merits" standard, to review

whether a federal agency such as the NMB acted beyond its statutory authority or in contravention of the constitution. Moreover, it raises important issues of federal law because it effectively shields from review decisions of a federal agency which have important ramifications for the nation's vital transportation industries -- even if those determinations violate the United States Constitution or exceed its authority under the RLA. Because this petition raises important issues of federal law, and involves a conflict between the circuits, it is well supported and should be granted.

I. THE NINTH CIRCUIT'S USE OF A "PEEK AT THE MERITS" JURISDICTIONAL STANDARD FOR REVIEW OF NATIONAL MEDIATION BOARD DECISIONS IS INCONSISTENT WITH DECISIONS FROM THIS COURT AND WITH THE MOST RECENT EN BANC DECISION FROM THE DISTRICT OF COLUMBIA CIRCUIT.

Since this Court first addressed the issue of federal court jurisdiction to review NMB determinations over 50 years ago, circuit courts have struggled to define the applicable standard. While the courts have adhered to this Court's holdings that the federal courts lack jurisdiction to review NMB determinations made within the NMB's narrowly circumscribed statutory authority, the circuit courts have split in deciding the separate question of federal court jurisdiction to review NMB determinations when the plaintiff alleges that the NMB's decision exceeds its statutory authority or is in contravention of the constitution. As shown below, on the latter issue, the standard of review adopted by the panel in this case is contrary to this Court's

rulings and conflicts with a well reasoned recent en banc decision from the District of Columbia Circuit (as well as prior panels from the Ninth Circuit). Because this split in the circuits involves a federal question of substantial importance, Supreme Court review should be granted.

A. Supreme Court Decisions.

The starting point for any analysis of federal court jurisdiction to review determinations of the NMB is this Court's decision in Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943). In Switchmen's, the plaintiff union challenged a decision of the Board to place all yardmen in a single craft or class. Id. at 299. According to the union, the Board's decision to certify a system-wide craft or class, rather than a separate craft or class at separate locations, was contrary to the RLA. Id. The district court rejected the claim on the merits and the court of appeals affirmed. Id. This Court reversed the lower courts -- not because they misinterpreted the RLA -- but because they were without jurisdiction even to reach the dispute. Id. at 300. In explaining its decision, this Court reviewed the legislative history of the RLA and the plenary authority Congress intended for the NMB when investigating a representation dispute and certifying a representative. Id. at 302-03. According to the Court, a decision by the Board within its Section 2, Ninth authority to investigate a representation dispute and certify a representative was to "reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." Id. at 305.

While Switchmen's held that Board decisions within its Section 2, Ninth authority were beyond federal court jurisdiction, it also ruled that federal courts do have jurisdiction to review Board determinations in violation of the constitution. Id. at 301. This Court has subsequently clarified that jurisdiction in the federal courts also exists to review Board determinations in excess of its statutory authority. Brotherhood of Ry. & Steamship Clerks, Freight Handlers, Express & Station Employees v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 669 (1965)(Board decisions are "not subject to judicial review where there is no showing that it has acted in excess of its statutory authority"). In these decisions, this Court has never recognized a "peek at the merits only" standard, or any limitations on federal court authority, to review whether the Board has acted beyond its narrow Section 2, Ninth authority, or violated the constitution.

B. Decisions From The Circuit Courts Of Appeals.

Construing these Supreme Court decisions, circuit courts of appeals, including the panel below, have uniformly held that federal courts have jurisdiction to review the Board's actions when the Board (1) exceeds its statutory authority under the RLA; (2) commits a gross violation of the RLA; (3) fails to investigate a representation dispute under the RLA; or (4) violates the constitution. See, e.g., America West II, App. at 8a; Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 661-62 (D.C. Cir. 1994), cert. denied, 514 U.S. 1032 (1995); America West Airlines, Inc. v. National Mediation Bd. ("America West I"), 986 F.2d 1252, 1257 (9th Cir. 1992); Russell v. National Mediation Bd., 714 F.2d 1332, 1346 (5th Cir. 1983); International

In-Flight Catering Co. v. National Mediation Bd., 555 F.2d 712, 717 (9th Cir. 1977).

In the instant case, however, the Ninth Circuit panel adopted a "peek at the merits" jurisdictional standard for review of NMB decisions where the plaintiff has alleged that the Board exceeded its statutory authority. America West II, App. at 9a (citing Brotherhood of Maintenance of Way Employees v. Grand Trunk Western R.R., 961 F.2d 1245, 1249 (6th Cir. 1992) and Professional Cabin Crew Ass'n v. National Mediation Bd., 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989)). According to this standard, a court may only "peek at the merits" of the complaint to see if the plaintiff's allegations are valid. App. at 9a. This is true even if a full hearing on the merits might well establish the asserted constitutional or egregious statutory violation because, according to the panel, "speedy resolution," rather than fidelity to the constitution or the requirements of the statute, is the more important objective. Id. This ruling not only places the Ninth Circuit at odds with this Court's rulings which established no such limitation on the exercise of federal court jurisdiction, and with recent authority from the District of Columbia Circuit, it also sacrifices important constitutional and statutory protections in the name of a misguided notion of speed and efficiency.

The "peek at the merits" standard employed by the panel below has previously been cited in decisions from the Fifth, Sixth and District of Columbia Circuits. Brotherhood of Maintenance of Way Employees v. Grand Trunk Western R.R., 961 F.2d 1245, 1249 (6th Cir. 1992); Professional Cabin Crew Ass'n v. National Mediation Bd., 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989); United States v. Feaster, 410 F.2d 1354, 1368

n.13 (5th Cir.), cert. denied, 396 U.S. 962 (1969); International Brotherhood of Teamsters v. Brotherhood of Railway, Airline & Steamship Clerks, 402 F.2d 196, 205 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968). These opinions, however, have absolutely no support in the RLA or other federal precedents, and thus are wrongly decided. Indeed, the earliest circuit court decision to employ the "peek at the merits" terminology, the District of Columbia Circuit Court opinion in Teamsters v. Railway Clerks, cites no case law or any statutory authority to support this standard of review, but rather creates the standard in the first instance without critical analysis or discussion. See 402 F.2d at 205. None of the other circuits adopting this standard have cited to any legislative history relating to the RLA, or any decisional authority except each other, which would support this limitation on their jurisdiction to review agency determinations which fall outside their statutory authority or violate the constitution.

Not only are the circuit court decisions adopting the "peek at the merits" standard insupportable by precedent, they are also plainly inconsistent with this Court's jurisprudence regarding the deference normally accorded to agency decisions. While this Court has recognized that review of agency decisions which are within their statutory authority may be severely circumscribed by statute,[2] it has also held that such decisions are clearly reviewable when they exceed the agency's statutory authority or violate the constitution. Johnson v. Robinson, 415 U.S. 361 (1974); Leedom v. Kyne, 358 U.S. 184, 188 (1958). Recognizing this distinction,

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[2] See, e.g., the Administrative Procedure Act, 5 U.S.C. § 701(a)(1), which prohibits judicial review of agency actions when the agency's statute bars such review.

this Court held that a decision of the National Labor Relations Board was reviewable by the federal courts because "the suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition of the Act." Leedom, 358 U.S. at 188. Thus, according to this Court's decisions, when an agency exceeds its statutory authority, federal courts are clearly authorized to review those actions and render an appropriate remedy.

Moreover, the Ninth Circuit decision in the instant case, adopting the "peek at the merits" jurisdictional standard, is also inconsistent with the most recent decision from the District of Columbia Circuit sitting en banc, and two prior decisions from panels of the Ninth Circuit. In two of these decisions, the circuit courts held that it is always within the jurisdiction of the federal courts to review and determine whether the NMB exceeded its statutory mandate. Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 661-62 (D.C. Cir. 1994), cert. denied, 514 U.S. 1032 (1995) (jurisdiction present when NMB acts in excess of its delegated powers or commits a gross violation of the RLA); America West Airlines, Inc. v. National Mediation Bd., 986 F.2d 1252, 1257 (9th Cir. 1992) ("the Board errs in its assumption that its discretion in choosing the means by which to conduct a representation investigation is completely unfettered"). In the third decision, also from a panel of the Ninth Circuit, the court made passing reference to the "peek at the merits" standard but at the same time held that the district court should go beyond the mere allegations of the complaint and consider evidence on the merits of the claim that the Board grossly violated the RLA --

something which was not allowed in the present case. See International In-Flight Catering Co. v. National Mediation Bd., 555 F.2d 712, 718-19 (9th Cir. 1977) (holding that the Board grossly violated the RLA by failing in its duty under Section 2, Ninth to investigate the representation dispute). Thus, the holding below creates a conflict not only between the circuits but within the Ninth Circuit itself.

This issue of jurisdiction was addressed persuasively, and in great detail, by the District of Columbia Circuit in RLEA. In that case, several railroad labor unions sued the NMB over merger procedures that the Board adopted for the railroad and airline industries. RLEA, 29 F.3d at 660. Although the district court dismissed the complaint on the grounds that it was without subject matter jurisdiction to decide the dispute, the circuit court, sitting en banc, reversed. Id. at 658-59. The circuit court rejected the Board's assertion that it was "powerless" to review the merger procedures and, in fact, determined that the Board exceeded its statutory authority in adopting those procedures. Id. at 660, 664. Specifically addressing the jurisdictional issue, the court ruled that "all Board actions which fall within Section 2, Ninth's compass are not immunized from judicial review. . . . [F]ederal courts have jurisdiction to review 'actions taken in excess of delegated powers.'" Id. at 661 (citing Leedom v. Kyne, 358 U.S. 184, 190 (1958)).

As construed by the RLEA court, the substantial deference reserved for the NMB by Switchmen's simply was not applicable when the Board acted outside its narrow Section 2, Ninth authority. 29 F.2d at 662. As the circuit court stated:

> "The non-reviewability rule announced in Switchmen's always must be understood in light of the very circumscribed role the Board was thought to play under Section 2, Ninth. . . . [T]he Board has no freewheeling authority to act as it sees fit with respect to anything denoted a 'representation dispute.'" Id.

When the Board acts outside this very narrow sphere, therefore, its decisions are subject to judicial review.

The "peek at the merits" jurisdictional standard used by the Ninth Circuit in the instant case is inconsistent with the rules set forth by this Court in Switchmen's and Leedom, as well as by the District of Columbia Circuit in RLEA. It is one thing for a federal court to decline jurisdiction when the conduct in question is clearly within the Board's statutory discretion. It is quite another, however, to allow only a "peek at the merits" when the complaint alleges conduct beyond an agency's statutory mandate or in violation of the constitution. This Court should resolve the conflict among the circuits on this point and clarify the appropriate standard for reviewing NMB decisions under the circumstances of this case.

C. The "Peek At The Merits" Standard Deprives The Courts Of Crucial Authority To Review Federal Constitutional And Statutory Violations.

The "peek at the merits" standard adopted by the panel below not only conflicts with the well reasoned authorities discussed above, it sets a dangerous precedent for the review of

important decisions from a federal agency. Indeed, in a Ninth Circuit decision subsequent to the panel decision at issue here, the court not only reaffirmed the "peek at the merits" standard, it also characterized that standard as allowing only a "cursory and superficial" review. Continental Micronesia, Inc. v. National Mediation Bd., 1997 U.S. App. LEXIS 26504 (9th Cir., Sept. 23, 1997) (unpublished). This basically amounts to no review at all, and is inconsistent with the role of the federal courts as the final arbiter of both constitutional and federal statutory rights. Webster v. Doe, 486 U.S. 592, 603 (1988).

In the present case, America West alleged in its Complaint and argued to the district court and the Ninth Circuit panel that the NMB committed a gross violation of the RLA, exceeded its statutory authority and failed in its duty to investigate by allowing discharged workers who had not themselves filed lawsuits seeking reinstatement -- and who had signed release agreements waiving any rights to reinstatement -- to vote in a representation election. As noted above, under the precedents from this Court, the District of Columbia Circuit, and two previous panels of the Ninth Circuit, the district court clearly had jurisdiction to determine whether those allegations were valid. Any other result relegates to the NMB sole power to determine the scope of its own statutory authority. While it is true that the NMB has broad and at times unreviewable discretion when it acts within its statutory authority, that principle does not apply when it is alleged that the NMB is acting beyond its statutory authority.

Thus, while the Ninth Circuit panel below characterized the present case as raising a jurisdictional issue, the real issues concern the scope of the Board's statutory authority to allow

discharged workers to vote in a union election when they have not challenged the validity of their discharge. Those issues are clearly for the federal courts, not the Board, to decide. Because the panel below adopted a standard which in effect immunizes a federal agency from judicial review of constitutional and gross statutory violations, this petition involves important issues of federal law which warrant this Court's attention.

II. THE NATIONAL MEDIATION BOARD'S DECISION TO PERMIT DISCHARGED WORKERS TO VOTE IN A REPRESENTATION ELECTION EXCEEDED ITS STATUTORY AUTHORITY AND CONSTITUTED A GROSS VIOLATION OF THE RAILWAY LABOR ACT.

In the proceeding below, the panel affirmed dismissal for lack of jurisdiction and on mootness grounds, and thus did not directly decide whether the Board had exceeded its statutory authority or grossly violated the RLA by counting the ballots of the discharged workers. It is well settled, however, that this Court may address issues presented to but not decided by the court of appeals when those issues are important and are likely to arise again in the future. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697 (1984); Carlson v. Green, 446 U.S. 14, 17 n.2 (1980).

Supreme Court review of the Board's decision in this case to enfranchise the discharged workers is exceptionally important because a Board agent, in contravention of a federal labor statute governing the vital transportation industries, contaminated a union election by announcing at the start of the balloting that discharged employees would be eligible to vote and

thereby, according to the allegations of the Complaint, rendered unreliable the election results. Moreover, by counting the ballots of discharged workers, the Board created a situation where the majority of voters in a representation election were not even employed by America West. As the authorities discussed above establish, the Board is likely to invoke its "dismissed employee" rule again in the future, and to apply it in a manner which exceeds its statutory authority and grossly violates the RLA. Because the scope of the Board's authority is a fundamental issue involving a critical national industry, this Court should resolve that issue now rather than remanding it to the panel below.

The Board's statutory authority to investigate representation disputes and certify collective bargaining representatives is found in the RLA. The statute obligates the Board to investigate any dispute which "shall arise among a carrier's employees as to who are the representatives of such employees" and to certify the organizations "that have been designated and authorized to represent the employees." 45 U.S.C. § 152, Ninth (emphasis added). The statute further provides that the "employees" of a carrier have the right to organize and bargain collectively and that the majority of such "employees" are authorized to choose the representative for purposes of collective bargaining. 45 U.S.C. § 152, Fourth.

In its regulations, however, the Board has created an exception to the statutory rule that only employees may choose the collective bargaining representative. According to the Board's Representation Manual, former employees who have been discharged from the carrier may vote in a representation election if "the discharge is being appealed through the applicable grievance

procedure or an action for reinstatement has been filed before either a court or a government agency of competent jurisdiction." See also 29 C.F.R. § 1206.6. Courts have upheld this exception to the statutory mandate under limited circumstances where the discharged employee in question has filed an action for reinstatement which is pending as of the date that the ballots are scheduled to be counted. See, e.g., Virgin Atlantic Airways v. National Mediation Bd., 956 F.2d 1245, 1250-51 (2d Cir.), cert. denied, 506 U.S. 820 (1992); Air Canada v. National Mediation Bd., 107 L.R.R.M. (BNA) 2028 (S.D.N.Y. 1980), aff'd, 659 F.2d 1057 (2d Cir.), cert. denied, 454 U.S. 965 (1981).[3]

In the present case, the Board extended its application of the so-called "dismissed employee" rule to a situation where the former employees in question had not only never filed a claim for reinstatement, they had in fact expressly waived any right to do so in written release agreements. Indeed, 375 of the 378 former workers enfranchised by the Board in this case agreed to accept valuable consideration, in some cases as much as $10,000, in exchange for a written promise to waive any rights to reinstatement and a covenant not to sue America West. Of the 375 former workers who signed releases, 373 honored their commitment and never instituted an action against America West to reinstate their employment.

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[3] In addition, the Sixth Circuit has upheld a different NMB rule allowing furloughed employees to vote in a case involving employees on temporary furlough who had preferential recall rights and who were eventually returned to their positions with the carrier. Nashville, C. & St. L. Ry. v. National Mediation Bd., 93 F.2d 340, 342-43 (6th Cir. 1937), cert. denied, 303 U.S. 649 (1938).

Nonetheless, based on the putative class action lawsuit filed by the IBT, the very union seeking certification to represent the America West employees at issue, the Board determined that these 373 employees had a pending claim for reinstatement at the time the ballots were counted and were therefore authorized to vote.[4] In reaching this conclusion, the Board conducted absolutely no investigation to determine whether any of the 373 employees who signed releases and accepted the valuable consideration had any desire to participate in the IBT's lawsuit. The Union presented no such evidence and none of the dismissed employees returned the consideration they received from America West in exchange for their release of claims. Thus, the only evidence on the issue before the Board, i.e. the release agreements, established that these employees in fact did not intend to challenge their terminations.[5]

The Board's determination that non-employees could vote in an election represents an expansion of the dismissed employee rule which finds no basis in the language of the RLA and no support from previous court cases involving this rule. Although the dismissed employee rule has been upheld by other circuits under limited conditions, the discharged employees in those cases -- unlike the discharged employees here -- had themselves

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[4] As noted earlier, the IBT's lawsuit was dismissed by the same district court that issued the decision at issue in this petition.

[5] The Board's failure to investigate in any manner whether the 373 dismissed employees wished to participate in the IBT's lawsuit, in the face of express covenants by these discharged workers to the contrary, also represented a gross violation of the Board's duty under the RLA to investigate the representation dispute. International In-Flight Catering, 555 F.2d 712 (9th Cir. 1977).

filed claims for reinstatement which were pending at the time the ballots were originally scheduled to be counted. See Virgin Atlantic, 956 F.2d at 1250-51. Thus, unlike the instant case, the discharged employees in those cases at least had a present or possible future connection with the carrier by virtue of their asserted claims for reinstatement. See Washington Cent. R.R. v. National Mediation Bd., 830 F. Supp. 1343, 1367 (E.D. Wash. 1993).

As noted above, while courts have indeed recognized that the Board has some latitude to construe the term "employee," it is beyond cavil that there must be some limitation to the Board's discretion. See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (agency decisions which are manifestly contrary to the terms of a statute are entitled to no deference). Certainly the Board could not enfranchise, for example, the spouses or the children of current employees because to do so would clearly conflict with the statute's command that only "employees" choose their representative. In this case, the conflict is just as clear because the discharged employees themselves had expressly manifested an intent not to seek reinstatement, and in fact had expressly disavowed any right ever to work for America West again. Under these circumstances, the Board clearly exceeded its authority and grossly violated the RLA by allowing these former employees to vote.

The panel opinion below does not pass upon the Board's decision to count the votes of the discharged workers. The panel dismissed this issue as moot on the grounds that the Board's decision on the day the ballots were counted could not have influenced the election results. App. at 13a. Although the panel

correctly noted that the election results in favor of the Union could not have been impacted by the full Board's election day decision (because the balloting period was over), it ignored the fact that, as alleged by America West in its Complaint, the election had already been impermissibly and irreparably contaminated by the NMB mediator's earlier decision on the same issue which was rendered immediately before the ballots were mailed. According to the Complaint, while the full Board's determination on the date of the ballot count may not have impacted the election, its earlier decision through the mediator to enfranchise the discharged workers "is traceable" to the injury alleged by America West and is likely to be redressed by a favorable decision. See Nome Eskimo Community v. Babbitt, 67 F.3d 813, 815 (9th Cir. 1995).

The panel decision in this case is particularly egregious because the claims asserted by America West were resolved on a motion to dismiss. No opportunity was provided to the carrier to present evidence of the alleged injury -- the impact of the Board's illegal conduct through the actions of its mediator -- on the election results. Had discovery been permitted, and evidence considered by the district court, a showing would have been made that the Board's decision in fact affected the decision of eligible voters. Under the rationale of the panel below, however, the Board was permitted to act unlawfully through its agent during the balloting process, and by reserving its final decision to the date of the ballot count, insulate itself from judicial review. This Court should not allow such a result and should rule that the NMB exceeded its statutory authority, and grossly violated the RLA, by allowing discharged employees to vote.

CONCLUSION

Because the panel decision below creates a conflict between and among the circuits, and because the issues presented herein raise important questions regarding the application of a federal statute, the Court should grant the instant petition for writ of certiorari.

DATED this 23rd day of December, 1997.

Respectfully submitted,
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICA WEST AIRLINES, INC., Plaintiff-Appellant, v. NATIONAL MEDIATION BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, AFL-CIO, Defendants-Appellees.	No. 96-17056 D.C. No. CV-96-00940-RGS OPINION

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Argued and Submitted
March 10, 1997—San Francisco, California

Filed July 11, 1997

Before: Arthur L. Alarcon, Robert R. Beezer and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Labor and Employment/Unions

The court of appeals dismissed an appeal from a judgment of the district court in part, and affirmed in part. The court held that a discharged employee with a pending claim seeking reinstatement may vote in a union representation election.

Appellant America West Airlines discharged 378 mechanics, nearly all of whom waived their right to reinstatement in exchange for cash. Appellee International Brotherhood of Teamsters and five of the mechanics filed a class action against America West seeking reinstatement.

Before the class was certified, the Teamsters filed an application with appellee National Mediation Board (NMB) for certification as the representative of America West's mechanics. The NMB allowed the discharged employees to cast provisional ballots in a representation election and determined after the election that the employees were eligible to vote. Of the 722 votes cast, 81 percent voted for the Teamsters; out of the 345 current employees who voted, 84 percent voted for the Teamsters. The NMB certified the Teamsters.

America West filed suit against the NMB and the Teamsters to declare the certification void. The district court dismissed the claims against the NMB for lack of jurisdiction; granted the Teamsters's motion for a preliminary injunction to compel America West to meet with it; and denied America West's motion for a preliminary injunction to enjoin enforcement of the certification.

On appeal, America West contended that the NMB exceeded its authority under the Railway Labor Act (RLA) by allowing the discharged employees to vote.

[1] The RLA provides that when there is a dispute as to the identity of the employee's representative, the NMB should investigate and certify the identity of that representative. [2] A

court may only "peek at the merits" in order to determine if the NMB committed a constitutional violation or egregious violation of the RLA. That limitation is intended to avoid the delays of litigation.

[3] The RLA provides that the NMB is authorized to take a secret ballot of *employees* to ensure the choice of representatives is by the *employees*. [4] The RLA also grants the NMB the power to determine who may participate in the election. An NMB regulation declares that dismissed employees with pending claims for reinstatement on the basis of wrongful termination are eligible to participate in representation elections. Other circuits have condoned this expansion of the definition of "employees." [5] The NMB's decision to permit the discharged employees to cast provisional ballots was not a per se gross violation of the RLA.

[6] America West contended that the NMB failed to investigate to determine if the discharged employees had pending claims, noting that the district court never certified the class. [7] The NMB exceeds its authority when it steps out of the investigator's inverness into the robe of the adjudicator. It acted properly by refusing to rule on whether the discharged employees could be certified as a class. [8] America West contended that the NMB should not have permitted employees who signed release agreements to vote. The validity of the release agreements, however, was central to the reinstatement action. It would have been improper for the NMB to reach the merits of the reinstatement claim.

[9] A peek at the merits did not indicate that the NMB failed to investigate whether the discharged employees had pending claims of reinstatement. The claims against the NMB were properly dismissed for lack of jurisdiction.

[10] The claim that the NMB's decision to count the ballots of the discharged employees was a gross error was moot. [11] If those votes had not been counted, the Teamsters would still have been elected.

[12] The district court did not err in granting the Teamsters's preliminary injunction [13] and in denying America West's.

COUNSEL

Robert A. Siegel, O'Melveny & Myers, Los Angeles, California, for the plaintiff-appellant.

Marc Richman, United States Department of Justice, Washington, D.C., David P. Dean, James & Hoffman, Washington, D.C., for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

This case arises out of the National Mediation Board's ("NMB" or "Board") decision to certify the International Brotherhood of Teamsters as the bargaining representative for America West Airlines' employee mechanics following a

representation election. America West contends that the NMB exceeded its authority under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*, by allowing 378 discharged employees to vote in the election. We have jurisdiction pursuant to 28 U.S.C. §§1291, 1292(a)(1), and we affirm in part and dismiss in part.

I

As a result of America West's decision to subcontract out its heavy maintenance, the Airline discharged 378 mechanics and related employees. Three hundred seventy-five of the discharged employees signed individual release agreements which waived their right to reinstatement in exchange for cash compensation.

The Teamsters and five of the discharged employees, including four who had signed release agreements, filed a purported class action against the Airline seeking reinstatement of the terminated employees.

The Teamsters also filed an application with the NMB to represent the mechanics. The NMB found that a representation dispute existed and ordered a representation election. Over America West's objection, an NMB mediator found that all 378 of the terminated employees were eligible to vote in the election because they had a pending claim, the purported class action, for reinstatement.

The NMB proceeded to mail ballots to both current and dismissed employees. The dismissed employees received "Challenged Ballots," pursuant to the NMB's standard practice for those individuals whose voter eligibility is at issue. Votes cast by

such ballot were to be counted only after the Board made a final decision regarding voter eligibility.

After the ballots were returned, the NMB issued its final determination that the dismissed employees were eligible to vote. Of the total 722 votes cast, 587 (81%) were for the Teamsters. Out of the 345 current employees who voted, 272 (79%) voted for the Teamsters. Out of the 377 dismissed employees, 317 (84%) voted for the Teamsters. Based on the results of the election, the NMB certified the Teamsters as the collective bargaining representative for America West's mechanics and related employees.

America West then filed this action. The Airline sought to enjoin the NMB and the Teamsters from enforcing the certification of the Teamsters as the mechanics' bargaining representative and to have the court declare the certification null and void. The district court granted the NMB's motion to dismiss the claims against the NMB for lack of jurisdiction. The court also granted the Teamsters' motion for a preliminary injunction to compel America West to meet with the Teamsters and denied America West's motion for preliminary injunction to prevent the NMB and the Teamsters from enforcing the certification or to commence bargaining prior to final resolution of this action. The district court certified its order dismissing the NMB under F.R.C.P. 54(b), and this timely appeal followed.

II

America West first argues that the district court erroneously concluded that it lacked subject matter jurisdiction to

hear the claims against the NMB. The existence of subject matter jurisdiction is a question of law reviewed de novo. *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1057 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 765 (1997).

A.

[1] The RLA provides that when there is a dispute as to the identity of the employee's representative, the NMB should investigate and certify the identity of that representative. 45 U.S.C. § 152, Ninth. In *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, ("Railway Clerks"), the Supreme Court declared that § 152, Ninth of the RLA gives the NMB, and not the judiciary, the "power to resolve controversies" concerning representation:

> where Congress 'has not expressly authorized judicial review . . . this Court has often refused to furnish one even where questions of law might be involved .... [T]he intent seems plain—the [representation] dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.'

380 U.S. 650, 659 (1965) (quoting *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 301-305 (1943)). The court explained that arguments "in terms of policy and broad generalities as to what the [RLA] should provide . . . are matters for Congress and the Board rather than the courts." *Railway*

Clerks, 380 U.S. at 671. The Court restricted judicial review of NMB decisions to questions concerning whether the Board "performed its statutory duty to 'investigate' the dispute." *Id.* at 661.

As we have noted before, *Railway Clerks* makes clear that judicial review of NMB decisions is to be extraordinarily limited: "so long as the Board is acting with the purpose of find[ing] the fact as to who is the employees' representative, the courts are deprived of jurisdiction to review Board decisions." *America West Airlines, Inc. v. National Mediation Bd.*, 986 F.2d 1252, 1256 (9th Cir. 1992) ("*America West I*") (internal quotation omitted) (alteration in original). The general rule is that judicial review of a NMB representation decision is available only upon a showing, on the face of the pleadings, that the NMB either violated the Constitution or committed a gross violation of the RLA. *See Hunter v. National Mediation Bd.*, 754 F.2d 1496, 1498 (9th Cir. 1985) (per curium) (refusing to review a NMB investigatory procedure because plaintiff failed to show that NMB action was unconstitutional, an egregious violation of the RLA or made in excess of delegated powers); *see also Kiamichi R.R. v. National Mediation Bd.*, 986 F.2d 1341, 1344 (10th Cir. 1993) (complaining party must show, on the face of the pleadings, that the NMB violated the constitutional rights of the employer, employee, or union, or grossly violated the RLA); *Virgin Atlantic Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1249-50 (2d Cir. 1992) (scope of judicial review is limited to "instances of constitutional dimension or gross violation of the statute"); *Professional Cabin Crew Ass'n v. National*

Mediation Bd., 872 F.2d 456, 459 (D.C. Cir. 1989) ("PCCA") (same).

[2] Further, other circuit courts have held that a court may only "peek at the merits" in order to determine if the NMB committed a constitutional violation or egregious violation of the RLA; if no error of this magnitude is disclosed, the case should be dismissed. *Brotherhood of Maintenance of Way Employees v. Grand Truck Western R.R.*, 961 F.2d 1245, 1249 (6th Cir. 1992); *PCCA*, 872 F.2d at 459. We adopt this limitation because it furthers the purpose of the RLA. The Supreme Court has stated that Congress committed representation disputes to the NMB's discretion because speedy resolution is the Act's "objective of the first order." *Railway Clerks*, 380 U.S. at 668. Permitting a full review of the merits in order to determine jurisdiction would defeat Congress' intent "to avoid the haggling and delays of litigation." *Railway Clerks*, 380 U.S. at 671. Allowing a "peek" at the merits enables a court to determine if the NMB has committed a gross violation of the RLA without causing undue delay.

B.

We now decide whether the district court properly concluded, based on a "peek" at the merits, that the NMB did not grossly violate the RLA by permitting the discharged employees to vote. This is an issue of first impression in this Circuit.

America West's argument that the NMB egregiously violated the RLA is best understood as presenting separate challenges to the NMB's pre-election decision to allow the casting

of provisional ballots by the discharged employees and to its post-balloting decision to count the votes of the discharged workers. We address each challenge in turn.

1. Pre-Election Decision

America West asserts that the NMB mediator's decision permitting discharged employees to cast provisional ballots was in gross violation of the RLA. The Airline asserts that it sustained an injury from this improper voter eligibility determination even though a majority of the then-current employees elected the Teamsters as their bargaining representative. The mediator's decision, the argument continues, improperly influenced the current employees' votes by validating the Teamsters' campaign rhetoric that America West violated the RLA by discharging the mechanics.

[3] America West urges this court to declare that the NMB committed a per se violation of the RLA by permitting the discharged employees to cast provisional votes. The Airline argues that the language of the RLA compels the conclusion that only current employees may vote in representational elections. America West cites, for example, §152, Ninth of the RLA which states that the NMB is "authorized to take a secret ballot of *employees* . . . [to] ensure the choice of representatives [is] by the *employees* . . . ." 45 U.S.C. § 152, Ninth (emphasis added). The Act defines "employee" as "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee ...." 45 U.S.C. § 151, Fifth. Because discharged workers do not fall within the definition of "employee," America West argues, they are not entitled to vote.

[4] However, the RLA also grants the NMB the power to determine "who may participate in the election." 45 U.S.C. § 152, Ninth. Accordingly, the NMB has established a regulation which declares that dismissed employees, with pending claims for reinstatement on the basis of wrongful termination, are eligible to participate in representation elections. 29 C.F.R. 1206.6. Other circuit courts have condoned this expansion of the definition of "employee". *PCCA*, 872 F.2d at 460-61 (former strikers with pending claims of reinstatement eligible to vote); *Virgin Atlantic Airways*, 956 F.2d at 1250 (former employees with pending claims of reinstatement eligible to vote).

[5] These decisions emphasize that: (1) it is within the sole jurisdiction of the NMB to decide who is eligible to vote; (2) the language of the statutory definition of "employee" is non-exclusive; and (3) the purpose of the RLA in ensuring that employee choice of a representative is independent from employer interference is furthered by allowing discharged employees with pending claims for reimbursement to vote. Based on these rationales, we hold that the NMB's decision to permit the discharged employees to cast provisional ballots was not a per se gross violation of the RLA.

[6] America West argues that, even if provisional voting by discharged employees does not qualify as a per se gross violation of the RLA, the NMB in this instance failed to properly investigate the representation dispute. Particularly, the Airline contends that the NMB failed to investigate whether the dismissed employees had pending claims of reinstatement based on a purported illegal discharge. America West asserts that 373 of the 378 discharged employees did not have pending claims for reinstatement because the district court never certified the employees as a class in the

reinstatement action brought by the Teamsters and five of the discharged employees.

[7] At the time the NMB mediator permitted the casting of provisional ballots by the discharged workers, however, the reinstatement action was still pending and the district court had not ruled on class certification. The NMB exceeds its statutory authority when it "step[s] out of the investigator's inverness into the robe of the adjudicator . . . regardless of whether its action also happens to be employed as an investigatory tool." *America West I*, 986 F.2d at 1258. Class certification is the province of the courts; the NMB would have departed from its investigatory role had it ruled that the discharged employees did not have pending claims for reinstatement because they could not be properly certified as a class. The NMB acted properly by refusing to rule on whether the discharged employees could be certified as a class.

[8] In the alternative, the Airline contends that even if the NMB correctly concluded that the dismissed employees had pending claims for reinstatement, the NMB should not have permitted employees who signed release agreements to vote. The validity of the release agreements, however, was a central issue in the reinstatement action. Again, it would have been inappropriate for the NMB to act as an adjudicator and reach the underlying merits of the reinstatement claim. *Id.*

[9] A "peek" at the merits does not indicate that the NMB failed to investigate whether the discharged employees had pending claims of reinstatement. The district court properly dismissed for

lack of jurisdiction the claims against the NMB regarding the discharged employees' provisional balloting.

2. Post-Balloting Decision

[10] America West also contends that the NMB's final determination to count the ballots of the discharged workers was a gross violation of the RLA. We dismiss this claim as moot.

[11] If the NMB had not counted the votes of the discharged employees, the Teamsters still would have been elected by an overwhelming majority of the then-current employees. Federal courts possess the power to render a decision when a plaintiff has suffered an injury-in-fact which is traceable to the challenged action and likely to be redressed by a favorable decision. *Nome Eskimo Community v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995). If one of these prerequisites is lacking, the court lacks jurisdiction and should dismiss the appeal as moot. *Id.* America West's asserted injury, the certification of the Teamsters as the bargaining representative of the mechanics, is not traceable to the NMB's decision to count the votes of the discharged employees.

III

America West also appeals the district court's preliminary injunction compelling the Airline to "meet with" the Teamsters as is contemplated by the RLA. A district court's grant or denial of a preliminary injunction will be reversed only when the district court abused its discretion or based its decision on an erroneous

legal standard or on clearly erroneous findings of fact. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996).

A party requesting a preliminary injunction must show either: "(1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping [sharply] in [its] favor." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993) (internal quotation omitted). These two formulations represent a continuum in which "the required degree of irreparable harm increases as the probability of success decreases." *Id.* (internal quotations omitted).

[12] The district court properly found that the Teamsters had a likelihood of success on the merits because, as discussed in section IIB above, the certification of the Teamsters as bargaining representative was not in gross violation of the Act. The court also correctly found that the employees whom the Teamsters represent would suffer irreparable harm to their rights under the Act by America West's failure to comply with Section 2, Ninth of the Act. This section states that upon the NMB's certification, the carrier is required to "meet with" the certified representative. 45 U.S.C. § 152, Ninth. The district court did not abuse its discretion in granting the preliminary injunction.

IV

Finally, America West contends that the district court improperly denied the Airline's motion for a preliminary injunction. The Airline sought to enjoin the NMB and the

Teamsters from attempting to enforce the NMB's certification prior to final resolution of this action.

[13] America West argued to the district court that an injunction was proper because the Teamsters improperly interfered with the election by filing a meritless lawsuit for the purpose of enabling discharged employees to vote in the representation election. Regarding this claim, the district court noted that "America West fails to argue any likelihood of success on the merits or show the existence of serious question going to the merits of this issue." The court found that America West did not meet its burden and thus denied the motion. The district court did not abuse its discretion.

AFFIRMED in part, DISMISSED in part.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICA WEST AIRLINES, INC.	)	No. 96-17056
	)	D.C. No.CV-96-00940-RGS
Plaintiff-Appellant,	)	
v.	)	ORDER
NATIONAL MEDIATION BOARD; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, AFL-CIO	)	
Defendants-Appellees.	)	

Before: ALARCÓN, BEEZER and O'SCANNLAIN, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain votes to reject the suggestion for rehearing en banc and Judges Alarcón and Beezer so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

AMERICA WEST AIRLINES, INC.,	)	CIV 96-0940-PHX-RGS
Plaintiff,	)	**O R D E R**
vs.	)	
NATIONAL MEDIATION BOARD, et al.,	)	
Defendants.	)	

BACKGROUND

This dispute centers around the National Mediation Board's ("NMB" or "Board") certification of the International Brotherhood of Teamsters ("IBT") as the bargaining representative of several hundred America West Airlines ("AWA" or "airline") employees following a representational election held on April 17, 1996. Over the objection of the airline, the Board decided to permit 378 discharged AWA employees to vote in the representational election. The NMB determined that the former employees were eligible to vote because they had a pending claim for reinstatement.[1] As a result of the election the National Mediation Board certified the

[1] The reinstatement claim -- IBT. et al. v. AWA, CIV 952924-PHX-RGS -- is pending before this Court.

union. Five hundred eighty seven of the total 722 votes made -- 81% -- were in favor of the IBT. In addition, the election results showed that 79% of the employees whose eligibility AWA did not challenge voted for the IBT.

On April 18, 1996, AWA filed a Complaint seeking declaratory and injunctive relief relating to the election and certification of the IBT. On April 19, 1996, AWA filed a Motion for Preliminary Injunction to enjoin Defendants NMB and IBT from attempting to enforce the NMB's certification pending the final resolution of this lawsuit. Doc. No. 2. The airline contends that the Board exceeded its statutory authority, failed to investigate a representational dispute in violation of its obligations under the Railway Labor Act ("RLA" or "Act") and committed a gross violation of the Act when it permitted the terminated employees to vote in the election. In response, Defendant National Mediation Board filed a Motion to Dismiss. Doc. No. 9.[2] NMB argues that the action should be dismissed because judicial review of the Board's decision is not appropriate. Finally, Defendant IBT filed a Motion for Preliminary Injunction requesting that the court enjoin AWA from refusing to promptly meet and bargain in good faith with the IBT. Doc. No. 34. The parties' motions have been fully briefed and the Court has heard the parties at oral argument. These matters are now ready for ruling.

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[2] NMB also filed a Motion for Summary Judgment in the alternative. On June 12, 1996, the Court denied this motion without prejudice as it was premature.

DISCUSSION

I. Motion to Dismiss

The Court will address NMB's Motion to Dismiss first as it is dispositive of a major issue in this lawsuit.

A. Jurisdiction

Defendant NMB argues that the Court does not have subject matter jurisdiction to review the Board's decision to permit the discharged employees to vote and moves to dismiss based upon Fed. R. Civ. P. 12(b)(1). The parties agree that the scope of a court's review of a NMB representational decision as to voter eligibility is narrow. Courts have described such review as "extraordinarily limited," America West Airlines v. NMB, 986 F.2d 1252, 1256 (9th Cir. 1993) (quoting Professional Cabin Crew Ass'n v. National Mediation Bd., 872 F.2d 456, 459 (D.C. Cir.), cert. denied, 493 U.S. 974 (1989)) ("PCCA"), and "one of the narrowest known to law," International Ass'n of Machinists & Aerospace Workers v. Trans World Airlines, Inc., 839 F.2d 809, 811 (D.C. Cir.), cert. denied, 488 U.S. 820 (1988) ("IAM v. TWA"). Courts may review NMB determinations only upon a "'showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or that it violated the constitutional rights of an employer, employee, or union.'" PCCA, 872 F.2d at 459 (quoting IAM v. TWA, 839 F.2d at 811). Although Courts may take a "peek at the merits to determine if the NMB has committed an error of constitutional dimension or gross violation of the statute," the court may not proceed unless the "peek" reveals an error that is obvious on the face of the papers.

PCCA, 872 F.2d at 459 (internal quotation marks omitted). Therefore it is necessary to take a peek at the merits of AWA's claim.

B. Determination of Eligible Voters

The airline contends that the NMB improperly permitted the discharged employees to vote in the election in gross violation of the RLA. AWA argues that although it may be permissible for the Board to permit discharged workers with pending reinstatement actions to vote in an election, most of the employees in this action did not have actions for reinstatement pending. In contrast, Defendant NMB argues that the NMB properly determined that the discharged employees had pending claims for reinstatement.

The NMB is obligated by Section 2, Ninth of the RLA to investigate and certify the choice of bargaining representative for each "craft or class" of employees. 45 U.S.C. § 152, Ninth. Moreover, Section 2, Ninth requires the NMB to designate "who may participate in the election and establish the rules to govern the election." Id. Although Section 2, Ninth provides broad discretion to the NMB in deciding who may vote in representational elections, other provisions limit eligible voters to include only employees. For example, Section 2, Fourth, states that "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing" and that "employees shall have the right to determine who shall be the representative . . .." 45 U.S.C. § 152, Fourth (emphasis added). Section 2, Ninth, as well, refers to disputes among "employees as to who are the representatives of such employees . . .." 45 U.S.C., § 152, Ninth (emphasis added). Finally, the NMB is "authorized to take a secret

ballot of employees . . . [to] insure the choice of representatives [is] by the employees . . .." Id. (emphasis added). Thus, it is clear from the text of the RLA that only "employees" may vote in representational elections.

The Act defines "employee" as "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee . . .." 45 U.S.C. § 151, Fifth. In interpreting the definition set out in Section 1, Fifth, courts have included furloughed employees and discharged employees with pending claims of reinstatement. E.g., Virgin Atl. Airways Ltd. v. National Mediation Bd., 956 F.2d 1245 (2d Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 67 (1992) (former employees with pending claims of reinstatement eligible to vote); PCCA, 872 F.2d 456 (former strikers who were permanently replaced eligible to vote); Nashville C. & St. L. Ry. v. Railway Employees' Dept., 93 F.2d 340 (6th Cir. 1937), cert. denied, 303 U.S. 649 (1938) (furloughed employees eligible to vote). NMB Regulations also specify that,

> [d]ismissed employees whose request for reinstatement [on] account of wrongful dismissal are pending before proper authorities . . . are eligible to participate in elections among the craft or class of employees in which they are employed at the time of dismissal.

29 C.F.R. 1206.6. The parties have indicated that the Ninth Circuit has not yet had the occasion to rule on the validity of the Board's "dismissed employee" rule. This Court concurs with the other courts that have examined this question and have concluded

that the Board's dismissed employee rule is an appropriate exercise of the Board's authority under the RLA.

Although AWA argues that the Board exceeded its statutory authority, failed to investigate a representational dispute in violation of its obligations under the Act and committed a gross violation of the Act when it permitted the terminated employees to vote in the election, these arguments can be reduced to the following: (1) the discharged employees did not have pending claims for reinstatement as a matter of law; and (2) the Board failed to properly investigate whether pending claims for reinstatement actually existed. The Court disagrees.

The Complaint in the underlying reinstatement action alleged wrongful discharge and sought class action certification for all of the discharged employees. The airline contends that 373 of the 378 discharged employees were not plaintiffs in the reinstatement action because the Court never certified the class under Rule 23. In fact, the named Plaintiffs in the reinstatement action never sought such certification. The NMB argues that its decision to treat the lawsuit as a class action was appropriate because the rule in the Ninth Circuit is that "during the interim between filing and certification, a court must assume for purposes of dismissal or compromise that an action containing class allegations is really a class action." Doc. No. 9 (citing Diaz v. Trust Territory of Pacific Islands, 876 F.2d 1401, 1408 (9th Cir. 1989). Moreover, NMB argues that the authority AWA cites is inapposite as it concerns certification at the time of judgment. Finally, in the Board's decision it determined that the requirements of Rule 23(a) appeared to apply on the face of the Complaint.

AWA also contends that even if the Board properly treated the reinstatement action as a class action, the Board's decision to permit the employees who signed waivers to vote was improper. AWA argues that the release agreements foreclosed, as a matter of law, any reasonable possibility of the restoration of the employer-employee relationship. The Board argues, however, that it considered this argument and determined that it would be improper for it to attempt to resolve the merits of or defenses to the pending reinstatement claim. The Board concluded that the releases were not a sufficient basis to deny eligibility to vote because the reinstatement Complaint was not frivolous on its face and AWA's waiver defense was still pending before this Court.

The Board correctly refrained from reaching the merits of the underlying reinstatement action. It is not the Board's role to make legal determinations as to the merits of the employees' reinstatement action. The Ninth Circuit held, in an unrelated case with the same caption as this action, that the National Mediation Board exceeds its statutory authority when it "step[s] out of the investigator's inverness into the role of the adjudicator . . . regardless of whether its action also happens to be employed as an investigatory tool." America West Airlines v. National Mediation Board, 986 F.2d 1252, 1258 (9th Cir. 1992) ("AWA v. NMB"). In that action the circuit court determined that the federal judiciary had jurisdiction to determine whether the Board exceeded its authority. Id. Although the NMB employs the AWA v. NMB case in support of its contention that the Court does not have jurisdiction, the proposition that the Board exceeds its authority when it acts as an adjudicative body is highly informative, if not controlling, in this matter.

Although the Board properly declined to make a determination on merits of the underlying reinstatement action, it did conduct an appropriate investigation into the dispute. The NMB argues in its Motion to Dismiss that it investigated the actual existence of the reinstatement claims by determining -- upon the face of the complaint in the reinstatement action -- that the 378 employees were represented as a class in light of Fed. R. Civ. P. 23(a). Moreover, the Board contends that it determined that it was not appropriate for the Board to reach the merits of the release agreement issue because that matter was before this Court in a pending motion to dismiss in the reinstatement action. It is not obvious from a peek at the face of the papers that the NMB's decision to treat the reinstatement action as a class action or to withhold deciding the merits of AWA's waiver defense while the issue was pending before this Court were gross violations of the Act or constitutional violations. Although the Court had not yet certified the class action, it was not a gross violation for the NMB to conclude that it should treat the action as such based upon Rule 23(a). Moreover, it was not a gross violation for the NMB to decline to reach the merits of the airline's waiver defense in making its determination while the issue was pending before this Court. There were colorable arguments presented relating to both issues in the reinstatement action pending before this Court. Moreover, there was an adequate investigation and examination of the existence of such colorable arguments by the Board. Therefore, the Board appropriately determined that the 378 discharged employees all had pending claims for reinstatement before this Court in IBT, et al. v. AWA, CIV 95-2924-PHX-RGS. See Crable Decl., Exh. 27.

The Court concludes that it is not the role of the NMB to make legal determinations concerning the outcome of pending actions for reinstatement beyond determining that the actions are not frivolous or that they are based upon colorable arguments. To require the NMB to do more would effectively require the NMB to act as an adjudicative body. Such a role is beyond its statutory authority. As the Ninth Circuit's AWA v. NMB holding indicates, it would have been inappropriate for the Board to reach the underlying merits of the reinstatement claims. AWA v. NMB, 986 F.2d at 1258 (stepping out of investigative role into adjudicative role is in excess of Board's statutory authority).

Finally, the Court acknowledges AWA's concern, expressed during oral argument, that upholding the NMB's investigation into the existence of valid claims for reinstatement creates an opportunity for letting the proverbial "fox guard the henhouse." AWA is concerned that such a result would permit unions and discharged employees (the foxes) to file frivolous lawsuits prior to certification elections in order to gain eligibility to vote in the election (the henhouse). The Court does not believe that is the situation in this action. Moreover, requiring the NMB to make a determination based upon the merits of a reinstatement action would require the Board to exceed it statutory authority. Accordingly, the Court heeds the airline's admonition but rejects its logic in the context of this action.

C. Conclusion

In view of the above considerations, the Court concludes that it does not have jurisdiction to consider Plaintiff's First Claim for Relief because a "peek" at the merits reveals that the Board did

not exceed its authority, act in gross violation of the Act or fail to conduct an adequate investigation. Accordingly, the Court will dismiss Plaintiff's First Claim for Relief and Defendant National Mediation Board from this lawsuit.

II. Plaintiff's Motion for Preliminary Injunction

A. Preliminary Injunction Standard

There are two factors to consider with respect to a motion for preliminary injunction: "The likelihood of the plaintiff's success on the merits; and, the relative balance of potential hardships to the plaintiff, defendant, and public." Native Village of Quinhagak v. United States, 35 F.3d 388 (9th Cir. 1994) (quoting State v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988)). Plaintiffs are entitled to a preliminary injunction if they show either: "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and the balance of hardships tipping [sharply] in [their] favor." MAI Sys. Corp. v. Peak Computers, Inc., 991 F.2d 511, 516 (9th Cir. 1993), cert. dismissed, 114 S. Ct. 671 (1994). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." Diamontiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990).

In other words, "[w]here a party can show a strong chance of success on the merits, he need only show a possibility of irreparable harm. Where, on the other hand, a party can show only that serious questions are raised, he must show that the balance of hardships tips sharply in his favor." MAI, 991 F.2d at

517 (quoting Bernard v. Air Line Pilots Ass'n. Int'l, AFL-CIO, 873 F.2d 213, 215 (9th Cir. 1989).

B. Merits of Plaintiff's Third Claim for Relief

In addition to the voter eligibility issue discussed supra, the Third Claim for Relief in the Complaint alleges that the IBT violated the rights of AWA's current employees under the RLA to freely select or reject a collective bargaining representative by filing a meritless lawsuit for the sole purpose of manipulating the NMB's rules to enable the discharged employees to vote. Although Plaintiff states in the introduction to its Motion for Preliminary Injunction that this claim exists, Plaintiff fails to argue a likelihood of success on the merits or show the existence of serious questions going to the merits of this issue in its motion. Rather, Plaintiff's Motion to Dismiss wholly focuses on the eligibility issue.

Despite Plaintiff's failure to properly argue the merits of its Third Claim for Relief in its motion, Defendant IBT briefly attempts to rebut the merits of Plaintiff's claim in its Response. After recognizing that Plaintiff failed to "explain" this claim in its motion, the union argues that the claim is an election interference charge which is essentially a representational dispute under the NMB's exclusive jurisdiction. Defendant argues therefore that the Court does not have subject matter jurisdiction over the claim.

In its Reply, the airline attempts to show that each of the IBT's arguments are "baseless." Again, however, the airline fails to argue that it has a likelihood of success on the merits for this claim. Rather, AWA focuses on dissuading the Court of the merit

of Defendant's attacks. Finally, Plaintiff argued at oral argument that Nestle Ice Cream Co. v. N.L.R.B. supports its Third Claim for Relief. 46 F.3d 578 (6th Cir. 1995). Although Nestle was decided in February of 1995, Plaintiff's first reference to the case was made to the Court the day before the hearing on this motion in a supplemental filing. Moreover, Plaintiff has never submitted any written argument citing the case.

Plaintiff bears the burden of establishing a likelihood of success on the merits or showing the existence of serious questions going the merits on this claim. Plaintiff has not met its burden. Plaintiff merely attacks Defendant's arguments. Moreover, Plaintiff's last minute submission of the Nestle case and brief argument of its application during the hearing does not satisfy its burden. Accordingly, the Court will deny Plaintiff's Motion for Preliminary Injunction.

III. Defendant IBT's Motion for Preliminary Injunction

Defendant moves for preliminary relief based upon its first counterclaim seeking to enjoin AWA from refusing to promptly meet and bargain in good faith with the IBT. Section 2, Ninth states that upon certification by the NMB the carrier must "treat with" the certified representative. 45 U.S.C. § 152, Ninth. The NMB has certified the IBT as the employees' representative. Failure to "treat with" the IBT based upon the pendency of the outcome of this lawsuit is clearly contrary the intent of the RLA. See, e.g., Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 545-47, 57 S. Ct. 592, 598-99, 81 L. Ed. 789 (1937). The Court concludes that based upon the Court's discussion of the merits of this action supra

Defendant has a likelihood of success on the merits. Further, the AWA employees in the unit will suffer irreparable harm to the extent that their rights under the Act are violated by AWA's failure to comply with the Act. The court, therefore, directs Plaintiff to "treat with" the IBT as contemplated by the Act.

Accordingly,

IT IS ORDERED granting in part and denying in part Defendant National Mediation Board's Motion to Dismiss. [Doc. No. 9]. The Court dismisses Defendant National Mediation Board as a party and Plaintiff's First Claim for Relief.

FURTHER ORDERED denying Plaintiff's Motion for Preliminary Injunction. [Doc. No. 2].

FURTHER ORDERED granting in part and denying in part Defendant IBT's Motion for Preliminary Injunction. [Doc. No. 34].

DATED this 1st day of September, 1996.

HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

23 NMB No. 42
April 17, 1996

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Re: NMB Case No. R-6420
America West Airlines, Inc.

Ms. Caira and Gentlemen:

This determination addresses the appeals filed by the carrier, America West Airlines, Inc. and the International Brotherhood of Teamsters (IBT), of Mediator Andrew J. Stites' March 20, 1996, eligibility rulings.

I.

On December 5, 1995, the IBT filed an application covering the craft or class of Mechanics and Related Employees,

employees of America West. The application was filed less than one year after the Board had issued a Dismissal following an election among the same craft or class on the carrier, in which less than a majority of eligible voters participated. Board Rule 1206.4(a)(1) provides for a one-year bar under most circumstances. The IBT requested the Board to waive the bar due to the "unusual and extraordinary circumstances." The IBT asserted that it began its organizational activity in late summer of 1995. According to the organization, on December 1, 1995, the IBT learned of the carrier's decision to contract out its heavy maintenance work effective January 31, 1996. The subcontracting would eliminate approximately 378 positions in the craft or class, many of whom, according to the IBT were "union committee people and open supporters of union representation." The IBT further alleged that the procedure followed in the reduction in force differed from past procedure. The organization also argued that "the underlying intent of America West's decision ... is to intimidate and coerce employees in the exercise of their rights under the RLA." In addition, the IBT contends:

> The timing of this layoff, subsequent to the mechanics' expression of substantial support for Teamsters' representation, requires a conclusion that it is the carrier's intent to permanently chill employee desire for representation. This action, when coupled with the history of this carrier's interference with prior employee efforts to gain the right to be represented by the Teamsters, constitutes a clear violation of the RLA.

On December 19, 1995, the carrier filed its response to the IBT's request for a waiver of the bar. America West disputed the organization's contention that the decision to subcontract was motivated by anti-union animus. According to the carrier, the decision was based solely upon economic factors. The carrier, therefore, opposed waiving the bar.

Due to the furlough of federal employees and weather-related closings in December 1995 and January 1996, the Board was unable to rule on the IBT's request. The organization withdrew its request on January 22, 1996, and filed a new application on January 29, 1996. The Board docketed the case on that date, and the cut-off date for eligibility purposes was established as January 19, 1996. The Board assigned Mediator Stites to the case, and based upon the investigation, authorized an election on February 23, 1996. Ballots were mailed on March 13, 1996, and the count is scheduled for April 17, 1996. All of the individuals whose eligibility is at issue have been sent "Challenged Ballots," pursuant to Section 12.205 of the Board's Representation Manual.

II.

A.

On December 27, 1995, the IBT and five named plaintiffs: Ron Edwon; Kenneth Doyle; Dennis Larsen; Pat Sampson; and Brian Connors filed with the United States District Court for the District of Arizona, a "Complaint for Injunctive Relief, Declaratory Judgement and Damages". The complaint alleged "violations of Section 2, Third and Fourth and Section 201 of the Railway Labor

Act ("RLA"), 45 U.S.C. §§152, Third and Fourth, and 181 and ... wrongful discharge."

Paragraph 15 of the complaint reads, as follows:

> Plaintiffs Ron Edwon, Kenneth Doyle, Dennis Larsen and Pat Sampson are employees of America West who were subjected to the terminations announced by America West on December 2, 1995 purportedly as a result of America West's decision to contract out all of its heavy maintenance work. They have been terminated in violation of their statutory rights to organize and chose a bargaining representative under the RLA. Moreover, each was coerced into signing a Release Agreement by the payment of $10,000, apparently designed to prevent them from seeking enforcement of these rights but without effect as to such rights, which are vested with a public interest. They sue on behalf of all employees who have been deprived of their right to choose their own representative from coercion, who have been deprived of their employment by America West's December 2 announcement and who have signed any form of release agreement ... This action is properly maintained as a class action pursuant to Fed. R. Civ. P. 23 in that: the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class ...; plaintiff's claims are typical of the claims of the

class, and plaintiffs will fairly and adequately represent the interests of the class.

Plaintiff Brian Connors was one of six individuals who did not accept the "lump sum payment of up to $10,000" offered by the carrier. In order to obtain this payment, America West states that "the employee was obligated to execute a written release agreement." Connors "sues on behalf of all such employees who ... have refused to sign any release agreement."

B.

America West filed a Motion pursuant to Rule 12 (b) (6), Fed. R. Civ. P. on January 16, 1996. The Motion was for Dismissal of the IBT's complaint "because [the IBT] does not represent any current or former employees of America West and therefore lacks standing." The second basis for the Motion was that claims of the four named plaintiffs who signed the release agreements "are barred by the terms of their release agreements." A hearing on the Motion was held on April 8, 1996. To date, the court has not ruled.

C.

The Release Agreement signed by the "terminated" America West employees provides, in part, as follows:

The employment of Employee with America West will be terminated effective January 31, 1996. Employee agrees and acknowledges that his/her employment with America West was "at will" and that Employee has no contractual relationship with

America West (except as created by this Agreement). Employee further agrees and acknowledges that he/she has no right to continued employment with America West, or to be reinstated or recalled to any such employment ....

... Employee hereby covenants not to sue and acknowledges full and complete satisfaction of and releases and discharges America West, its divisions, subsidiaries, ... from and with respect to any and all claims, wages, agreements, obligations, demands and courses of action ... arising out of or in any way connected with: Employee's employment with America West; the termination of Employee's relationship with America West; or any other transaction ....

The release given by Employee includes, without limitation, release and discharge or any and all claims .... and for alleged violation of ... any other federal, state or local law, regulation or ordinance.

III.

A.

Mediator Stites issued his eligibility rulings on March 20, 1996. Citing the Railway Labor Act, specifically Section 2, Ninth, the Board's Rules at 29 C.F.R. §§1206.6 and 1206.7, and Section 5.304 of the Board's Representation Manual, the Mediator determined that the employees terminated as of January 31, 1996 were eligible. The basis for this ruling was that there was an action for reinstatement pending on behalf of 378 employees. Section 1206.6 of the Board's Rules and Section 5.304 of the Representation Manual provide that discharged employees who

have an action for reinstatement pending are eligible. The Mediator also ruled that individuals "furloughed or separated from employment prior to December 2, 1995" were not eligible, because they did not have an action for reinstatement pending nor a reasonable expectation of recall.

The IBT had asserted that three individuals who were omitted from the list of potential eligible voters, Glen Fort, Donald Maddock, Jr., and Kent Wright were eligible. The mediator ruled that as these individuals were not covered by the lawsuit, and as there was apparently no other basis for their eligibility, they were ineligible.

B.

Both America West and the IBT have appealed portions of the mediator's rulings. The carrier contests the eligibility of the individuals terminated effective January 31, 1996.[1] The IBT appeals the ruling on the eligibility of Fort, Maddock and Wright. The appeals were filed March 27, 1996, and responses to the appeals were filed April 4, 1996. The carrier filed an unsolicited response to the IBT's April 4 submission on April 10, 1996. The IBT submitted a final statement on April 12, 1996.

The carrier cites Sections 2, Fourth, and 2, Ninth of the Railway Labor Act for the proposition that employee representatives must be selected by the majority of current

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[1] The carrier does not appeal the eligibility of Brian Connors as he is a named plaintiff and never signed the Release Agreement.

employees. In addition, America West cites two decisions issued by district courts in the Ninth Circuit, Continental Micronesia, Inc. v. NMB No. 95-0019 (D.N.M.I. Nov. 13, 1995), and Washington Central R.R. v. NMB, 830 F. Supp. 1343 (E.D. Wash. 1993). According to the carrier:

> the Board may permit a former employee to vote only where there exists 'some present connection, either through a pending claim for reinstatement or through a preferential right of rehire, between the eligible voters and the carrier at the time of the originally scheduled vote count'. Washington Central, 830 F. Supp. at 1364 (citing Virgin Atlantic Airways, Ltd. v. NMB, 956 F.2d 1245 (2nd Cir.), cert denied, 113 S. Ct. 67 (1992)); and Professional Cabin Crew Ass'n v. NMB, 872 F.2d 456 (D.C. Cir.), cert denied, 493 U.S. 974 (1989)).

The carrier argues that the complaint filed by the IBT and the five named plaintiffs does not constitute a "present connection." As a basis for this argument, America West contends that the complaint is not a class action because it is not certified pursuant to Rule 23 of the Federal Rules of Civil Procedure. The carrier also asserts that the named plaintiffs have not filed a motion for certification. Therefore, the carrier maintains, "contrary to Mediator Stites' assertion, there is no action pending as to 373 of the 378 former employees." (Emphasis added).

The second basis for the carrier's appeal is that "all but three of the 378 former employees ... had executed release

agreements ...." It is the carrier's position that because these individuals had "expressly consented to termination .... and ... expressly waived any claim to reinstatement," they cannot be part of a lawsuit requesting reinstatement. The carrier's final argument is that allowing 378 former employees to vote could result in certification without support from the majority of the approximately 351 current employees.

The IBT urges the Board to uphold the Mediator's ruling on the terminated employees. According to the organization, the Mediator's ruling "is consistent with the Board's Rules, its Representation Manual, established Board precedent and the intent and purposes of the Railway Labor Act."

In addition, the IBT asserts that the mediator properly declined to address the merits of the action. In support of this assertion, the organization cites Buffalo & Pittsburgh Railroad, 18 NMB 87 (1990), in which the Board, referring to its Rules and its Manual, stated:

> In applying these guidelines, the Board does not consider the merits of the discharge or appeal, nor does the Board speculate upon the outcome.... In the absence of final action ... the Board finds [individuals with pending claims] eligible. (Emphasis added).

The IBT also cites Air Canada, 7 NMB 71 (1979) and 7 NMB 106 (1979). The carrier in that case had discharged approximately 80 employees shortly before the IBT filed an application. These discharged employees had filed suit seeking

reinstatement and on that basis the Mediator, and the Board, found the individuals eligible, despite the fact that they had accepted severance pay.

Finally, the IBT argues that the allegations contained in its complaint are consistent with Federal Rule 23.

C.

The IBT has also appealed the Mediator's ruling on Fort, Maddock and Wright, maintaining that these individuals perform functions which have been determined previously to be within the craft or class of Mechanics and Related Employees.

The carrier asserts that these individuals currently perform functions which place them outside the craft or class. America West also cites Section 4.6 of the Representation Manual in support of its position that the Board should deny the IBT's appeal, because the organization presented neither the arguments nor evidence which were submitted with its appeal to the Mediator.

IV.

A.

45 U.S.C. §152, Ninth, provides, in part, as follows:

> In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election.

The election "rules" established by the Board are set forth in 29 C.F.R. §§1206.1 through 1206.8, the Representation Manual, and Board Determinations. Section 1206.6 of the Board's Rules provides:

> Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal. This does not include dismissed employees whose guilt has been determined, and who are seeking reinstatement on a leniency basis.

Section 1206.7 provides:

> The Rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the Act.

The principle contained in §1206.6 is set forth in Section 5.304 of the Representation Manual which states:

> Ordinarily, discharged or terminated employees shall be ineligible unless the discharge is being appealed through the applicable grievance procedure or an action for reinstatement has been filed before either a court or a government agency of competent jurisdiction. An individual shall not

> be considered eligible if the grievance or court action has been finally acted upon and the discharge has been upheld prior to the count of ballots (see NMB Rules, Part 1206.6).

The Board has consistently applied these provisions in numerous determinations in finding terminated employees eligible if their claims for reinstatement are still pending as of the date for which the count was originally scheduled. For example, in Virgin Atlantic Airways, 15 NMB 179 (1988), the Board counted the ballots of individuals whose claims were pending as of the scheduled count date, although not as of the date the ballots were actually counted. The Board's action was ultimately upheld in Virgin Atlantic Airways, Ltd. v. NMB, 956 F. 2d 124 (2d Cir.), cert. denied, 506 U.S. 820.

The two Ninth Circuit cases cited by America West, Washington Central, supra, and Continental Micronesia, supra, are distinguishable based upon the facts. In neither case were there even allegations of pending claims for reinstatement as of the dates the ballots were counted. Since here there are allegations of wrongful dismissal which are not on the face of the complaint frivolous, and since those allegations are pending in court, the Board's rules and precedent provide for the eligibility of those employees alleged to have been wrongfully terminated.

B.

As noted above, the complaint's allegations of wrongful dismissal are sufficient to establish eligibility for those terminated employees covered by the complaint. However, the IBT and the carrier differ sharply over the number of individuals covered by the complaint. In resolving that difference, the Board looks to the face of the complaint to determine whether the pleading alleges a sufficient basis under Rule 23 of the Federal Rules of Civil Procedure to encompass a class of 378 terminated employees.

FRCP Rule 23(a) states:

> ... One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joining of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of their representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The Board's review of the complaint filed by the IBT and the five named plaintiffs reveals that the complaint alleges that all four requirements of Rule 23(a) are met. Since the court has not resolved the class certification issue one way or the other, the matter is still pending before the court. Accordingly, the Board finds the complaint on its face does allege a sufficient basis for finding class coverage.

C.

The carrier has also argued that there can be no pending action as to 373 of the 378 terminated employees because they accepted severance pay and signed the Release Agreements. As discussed above, the IBT has alleged that any releases signed by the terminated employees are invalid. The Board does not attempt to resolve the substantive merits of claims of wrongful dismissal or defenses to those claims. See, for example, Air Canada v. NMB, 478 F. Supp. 615 (S.D.N.Y. 1979) and Air Canada v. NMB 107 LRRM 2028 (S.D.N.Y. 1980) aff'd mem, 659 F.2d 1057 (2d Cir. 1981) cert. denied 454 U.S. 965. The District Court held (107 LRRM at 2032):

> This regulation [29 C.F.R. §1206.6] is consistent with the statutory language of the 45 U.S.C. §152 Ninth, to "insure the choice of representatives by the employees without interference, influence or coercion" and the purpose of the RLA to speedily settle representation disputes without infringing upon employees' rights, see 45 U.S.C. §151a (1976). The decision of the NMB to permit the ramp servicemen to vote in the representation election is consistent with the statute and must therefore be upheld.

Here the Board finds, consistent with past precedent and policy, that it would be inconsistent with the purposes of Rule 1206.6 and Section 5.304 of the Manual for the Board to consider the merits of the complaint or the carrier's defenses to that complaint. Since the complaint is not on its face frivolous and

since the allegations of the complaint and the carrier's defense based on the signed releases are still pending in court, the Board finds that the releases are not a sufficient basis to deny eligibility to the employees who signed releases.[2]

D.

Just as it would be speculative for the Board to consider the merits, not yet adjudicated, of the complaint at issue, it is also speculative for the Board to assume that a majority of the terminated employees may vote in favor of representation, while the majority of the current employees may not. In any event, any indication of the voting preference would be contrary to the Board's policy of conducting elections in a confidential manner. See, e.g., United Air Lines, Inc., 22 NMB 288 (1995). Until the ballots are counted on April 17 there is no way of knowing the outcome of the election.

V.

Section 4.6 of the Board's Representation Manual deals with "Appeals of Mediator's Decisions". That provision states, in part, "[a]bsent extraordinary circumstances, evidence submitted on appeal will not be considered by the Board unless it has been submitted to the Mediator initially." The Board's review of the record indicates that the IBT did not provide to the mediator the

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[2] The Board notes that it considered all the arguments and evidence submitted by the participants in this case. This decision, however, focuses on matters critical to the Board's determination.

evidence submitted with its appeal on the eligibility of Fort, Maddock and Wright. Also, there is no basis presented (nor argument made) indicating that the evidence in question was not available prior to the appeal. Therefore, as the Board finds no extraordinary circumstances which warrant consideration of the IBT's newly submitted evidence on appeal and since the appeal is based entirely on the newly submitted evidence, the Board finds that the three individuals covered by the appeal remain ineligible, as ruled by the Mediator.

CONCLUSION

Based upon the record in this case viewed in light of Board policy and precedent, the Board finds that the 378 employees terminated effective January 31, 1996, are eligible, as there has been no final resolution of their pending action for reinstatement to date. The Board further finds Fort, Maddock and Wright ineligible. The count will take place as scheduled at 2:00 p.m. EDT, Wednesday, April 17, 1996.

By direction of the NATIONAL MEDIATION BOARD.

Stephen E. Crable
Chief of Staff

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